Supreme Court, U.S.
FILED
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

LATHA RESTAURANT CORP.

Petitioner

V.

TOWER INSURANCE COMPANY

Respondent

On Petition For Writ of Certioriari
To the Supreme Court of the State of New York,
Appellate Division, 1st Department

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the granting of summary judgment dismissing Petitioner's action, based on application of a judicially created conclusive presumption of fraud, without any actual proof of fraud or fraudulent intent, such as to void an undeniable contract of insurance, deprived petitioner of its property without due process of law, in violation of the Fourteenth Amendment to the US Constitution.

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UNITED STATES CONSTITUTION

Fourteenth Amendment Passim

FEDERAL STATUTE

28 USC § 1257(a) 2

PRELIMINARY STATEMENT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New York, Bronx County, in this case, as affirmed by the Supreme Court of the State of New York, Appellate Division, 1st Department. Leave to appeal from this judgment to the New York State Court of Appeals, was denied on June 28, 2007.

OPINIONS BELOW

The opinion of the New York State Supreme Court, Appellate Division, 1st Department (Pet. App. A, p. I - III), is Reported at 38 AD2d 321, 831 NYS 2d 411 (NYAD, 1st Dept, March 15, 2007). Denial of leave to appeal from this decision, by the New York State Court of Appeals, (Pet. App. C, p. XII), was reported at 9 NY 3d 803, 872 N.E. 2d 876, ---- NYS 2d ----- (June 28, 2007).

JURISDICTION

The decision and order of the New York State Supreme Court, County of Bronx, granting summary judgment dismissing Petitioner's action (Pet. App. B, p. IV - XI), was entered on January 19, 2006. This decision and order was affirmed by the New York State Supreme Court, Appellate Division, 1st Department, on March 15, 2007. (Pet App A, p. I-III). Discretionary review of the judgment of the New York State Supreme Court was denied by the New York Court of Appeals, the state court of last resort, on June 28, 2007. (Pet. App. C, p. 39). This Court has jurisdiction over this petition pursuant to 28 USC § 1257(a).

CORPORATE DISCLOSURE STATEMENT

The Petitioner has no parent corporation and no publicly held corporation owns any share of Petitioner.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall ... deprive any person of life, liberty, or property, without due process of law.

STATEMENT

This petition presents the issue of whether the granting of summary judgment against Petitioner, based upon application of a judicially created conclusive presumption of fraud, without any actual proof of fraud or fraudulent intent, such as to void an undeniable contract of insurance, deprived Petitioner of its property without due process of law, in violation of the Fourteenth Amendment to the US Constitution.

See ***Western & Atlantic Railroad v. Henderson*** 279 US 639, 49 S. Ct. 445 (1929) and ***Carella v. California*** 492 US 937, 110 S. Ct. 23 (1989).

In the present matter, Petitioner's action was dismissed on a motion for summary judgment, and Petitioner has exhausted its appeals in the state court system. The granting of summary judgment herein was based on the application of a conclusive presumption of fraud as opposed to actual evidence of fraudulent intent.

Petitioner's only remedy is to petition this honorable Court, under the Constitutional principles set forth herein. Because the New York Courts have upheld and recognized this conclusive presumption, only this Court can correct this injustice, and review of this matter is plainly warranted.

FACTUAL BACKGROUND

The relevant facts of the present action, as determined by the lower Courts, are as follows.

The present action was an action to recover on Petitioner's insurance policy with Respondent. In 1992 – 1993, Petitioner was the owner of the Marathon Diner, located at 243 Hunts Point Avenue, Bronx, New York, in the Hunts Point commercial section of the Bronx, New York. In October 1992, Petitioner purchased the diner for $200,000. After the purchase, Petitioner made improvements in the diner for which Petitioner, in pre-trial deposition testimony, alleged to have paid $60,000. A year after the purchase, the diner was completely destroyed by a fire.

Due to the destruction of the diner, Petitioner's loss in the business was total. Despite Petitioner's undeniable contract of insurance with Respondent, Petitioner's claim for indemnification under its policy

was never adjusted, and Petitioner brought the present action. As a result of the denial of the claim, and the granting of summary judgment dismissing Petitioner's action, Petitioner received no compensation or indemnification for its loss and the diner has never been rebuilt.

In the Courts below, summary judgment was granted dismissing Petitioner's action on the ground of fraud, which was held to have voided Petitioner's insurance policy. The finding of fraud was based on a judicially created conclusive presumption, under the New York precedent of ***Saks v. Continental Ins. Co.*** 23 NY 2d 161 (1968).

After the fire, Petitioner hired an independent public adjuster as its agent to adjust the claim with the Respondent. Petitioner completely delegated the adjustment of the claim to this adjuster.

Petitioner's immigrant owner testified in his pre-trial deposition that he had no input into the documents prepared by the Public Adjuster and signed them without understanding them. The proof of loss statement prepared by the public adjuster valued the claim at $663,627.75. The proof of loss contained some of the same items listed twice (duplicative items), and contained gross and obvious errors. Despite the submission of the proof of loss in the amount of $663,627.75, the maximum recovery under Petitioner's policy was $300,000. Petitioner's explanation of the amount of the proof of loss was that its public adjuster was guilty of gross negligence and not fraud. For example, there was no claim for any property, such as valuables, fixtures or equipment that were not in fact present in the diner at the time of loss. All of the errors in the proof of loss were patent and obvious, and easily corrected or correctable.

Based on this record, the lower Court (New York Supreme Court, Bronx County, Justice Roman), granted summary judgment dismissing Petitioner's action in its entirety. The lower Court applied a judicially created presumption of fraud held to exist in New York. According to the lower Court, under ***Saks v. Continental Insurance***, supra, when an insured can only prove a small percentage of his loss, a presumption arises that the statement of value and quantity set out in his proof is false and fraudulently prepared... This presumption becomes conclusive where it is shown that the difference between the amounts claimed in the proof of loss and those actually proved to have been destroyed tendered are grossly disparate and the explanation tendered is so unreasonable or fantastic that it is inescapable that fraud has occurred. (Pet. Appendix A, at P.31, citing ***Saks***, supra, 23 NY 2d at 166.)

On appeal, the New York State Supreme Court, Appellate Division, 1st Department, affirmed summary judgment dismissing Petitioner's action. The Appellate Division held that the presumption of fraud arising from the overvaluation of insured property was conclusive, and that summary judgment was in all respects appropriate. (Pet. Appendix B, p. 35-36, ***Latha Restaurant Corp. v. Tower Insurance Company***, 38 AD 2d 321, 831 NYS 2d 411 (1st Dept. 2007).

Leave to appeal from this decision was denied by the New York State Court of Appeals on June 28, 2007, without opinion. (Pet. Appendix C, at P.38-39, ***Latha Restaurant Corp. v. Tower Insurance Company***, 9 NY 3rd 803, ---- NYS 2d -----, 872 NE 2d 876 (2007)[1]

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[1] The lower New York Court and the New York Appellate Division, 1st Department also held that '[Petitioner's] refusal to provide requested information material to [Respondent's] investigation of the claimed loss breached the co-operation clause of the policy'. Pet. App. C, p.36. It is submitted that summary judgment on

The application by the New York Courts of this conclusive presumption of fraud to dismiss Petitioner's action violated Petitioner's due process rights under this Court's precedents of ***Western & Atlantic Railroad v. Henderson*** 279 US 639, 49 S. Ct. 445, 73 L. Ed. 884 (1929), ***Carella v. California*** 491 US 263, 109 S. Ct. 2419, 105 L.Ed. 218, rehearing denied 492 US 937, 110 S. Ct. 23 (1989), and ***Manley v. Georgia*** 279 US 1, 49 S. Ct. 215, 73 L. Ed. 575 (1929).

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this issue was tainted by the findings of fraud based on the application of the unconstitutional conclusive presumption. Technical failures to provide documents will not ordinarily void an insurance policy for non-cooperation. ***High Fashions Hair Cutters v. Commercial Union Ins. Co.*** 145 AD 2d 465,535 NYS 2d 425 (2nd Dept., 1988). Summary judgment on this issue was inappropriate, and would unlikely have been granted absent the corresponding finding of fraud, which was based on the unconstitutional application of a conclusive presumption.

REASONS FOR GRANTING THE PETITION

I. APPLICATION OF A CONCLUSIVE PRESUMPTION OF FRAUD TO GRANT SUMMARY JUDGMENT DISMISSING THIS ACTION CONTRAVENES THIS COURT'S PRECEDENTS

In ***Western & Atlantic Railroad v. Henderson***, supra, it was held that "a presumption that is arbitrary, or that operates to deny a fair opportunity to repel it, violates the due process clause of the Fourteenth Amendment. 279 US at 642, 49 S. Ct. at 447, citing ***Manley v. Georgia***, supra.

In ***Western & Atlantic***, supra, a statutory presumption of negligence in accidents caused by the operation of railroad locomotives was held to violate the 14th Amendment. *Id.* Even though the Railroad could rebut the presumption by a showing that its employees exercised ordinary care and diligence, the application of the presumption was still held to be a deprivation of Due Process. 279 US at 642-643, 49 S. Ct. at 447.

In ***Manley v. Georgia***, supra, a state statutory presumption that bank insolvencies were due to fraud was held to violate the 14th Amendment, despite the provision that the bank officers could rebut the presumption by showing that the bank had been fairly and legally administered. 279 US at 4-5, 49 S. Ct. at 216 – 217.

In ***Carella v. California***, supra, in a criminal context, state statutory presumptions of fraud when leased or rented property was not returned were held to violate the Fourteenth Amendment. 491 US at 264 – 265, 109 S. Ct. at 2420 – 2421.

In ***Western & Atlantic***, the presumption that the railroad accident had been caused by the railroad's negligence was held to be unreasonable and arbitrary, and to violate the 14th Amendment Due Process clause.

According to the Court, the mere fact of a collision between a railway train and a vehicle did not

furnish a basis to necessarily conclude that the accident was caused by the negligence of the railroad. 279 US at 642-643, 49 S. Ct. at 447.

Similarly, in ***Manley***, the inference of crime and guilt based on fraud could not necessarily be drawn from the mere fact that a bank was insolvent. 279 US at 5, 49 S. Ct. at 217.

In ***Western & Atlantic*** the railroad's negligence could have been a cause of the accident, but it was unreasonable to presume that the Railroad was negligent based solely on the occurrence of the accident. In ***Manley***, the bank officers' fraud could have been the cause of the bank's insolvency, but it was unreasonable to presume fraud based only upon the fact of insolvency .

In the present case, the application of the presumption of fraud was just as arbitrary as the application of the unconstitutional presumptions struck down by this Court. Just because there was an

overvaluation of the loss does not necessarily mean that there was fraud. In the present case, Respondent's explanation of the overvaluation was mistake and negligence by its adjuster, but this was rejected due to the conclusive presumption of fraud. It is submitted that the New York presumption that overvaluation is due to fraudulent misrepresentation is just as arbitrary and unconstitutional as the presumption of railroad negligence in ***Western Atlantic*** and the other presumptions struck down by this court.

To prove fraudulent misrepresentation under New York law, Respondent had the burden to show that Petitioner misrepresented its loss, and that those misrepresentations were intentionally false, relevant and material. ***Fold-Pak Corp. v. Liberty Mutual Fire Ins. Co***. 784 F. Supp. 49 (WDNY 1992), citing ***Kaffalos, Inc. v. Excelsior Ins. Co. of New York*** 105 AD 2d 957, 482 NYS 2d 96 (3rd Dept. 1984)

Respondent had the burden to make this showing by clear and convincing evidence. ***Ausch, et al., v. St. Paul Fire & Marine Insurance Company***, 125 AD 2d 43, 511 NYS 2d 919 (2nd Dept. 1987).

In the present case, respondent was allowed to meet this high burden of proof through the application of New York's judicially created presumption of fraud. In applying this presumption of fraud in this manner, the issue of fraud and misrepresentation was unconstitutionally decided against Petitioner in a manner violating the due process clause of the Fourteenth Amendment, as interpreted by this Court's precedents.

Thus, Petitioner was deprived of its property – the complete and total value of its small business, which Petitioner had purchased one year before and which it had expended substantial sums to improve, based on an unconstitutional presumption, on a motion for summary judgment without even the benefit of a trial. This is

despite the fact that the element of intent, where it pertains to fraud and misrepresentation, has been held to be notoriously inappropriate for summary judgment. ***National Union Fire Ins. Co. of Pittsburgh v. Turtur*** 892 F2d 199, 205 (2nd Cir. 1989). Nevertheless, in the present matter, the issue of fraud and intent was decided against Petitioner on a motion for summary judgment, the application of an unconstitutional New York presumption of fraud.

Further, all three cases cited herein where applications of conclusive presumptions were held to violate Due Process rights all involved presumptions that were applied by finders of fact at trial. How much more a violation of due process rights is it for the Petitioner to have been deprived of its property based on a conclusive presumption, in the context of a motion for summary judgment, without even being afforded the opportunity to present its case at trial.

II. THIS COURT SHOULD CONSIDER THE IMPORTANCE OF A CASE SUCH AS THIS TO SMALL BUSINESSES IN AREAS LIKE THE BRONX, NY

Petitioner's small business was located in the historically economically disadvantaged area of the Bronx New York, where the risks of operating businesses are high, and the importance to these businesses of being able to rely on insurance to recover casualty losses is paramount. This is demonstrated by the fact that, due to Petitioner's inability to recover any indemnification for its loss, Petitioner's small business was destroyed and never re-opened. To allow a business to be destroyed and to be deprived of any right of indemnification for its loss without trial, based on a conclusive presumption in violation of its due process rights is a rank injustice, and an issue worthy of the attention of this Court

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Morton S. Minsley, Esq.

By:_____
Morton S. Minsley

APPENDIX

APPENDIX A

DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, 1ST DEPARTMENT, DATED MARCH 15, 2007

Friedman, J.P., Nardelli, Gonzalez, McGuire, Malone, JJ.

Latha Restaurant Corp., doing business as Marathon Diner, Index 24858/95

Plaintiff-Appellant,

-against-

Tower Insurance Company,

Defendant-Respondent.

Order, Supreme Court, Bronx County (Nelson S. Roman, J.), entered January 19, 2006, which, in this action to recover insurance proceeds, grants the motion of defendant Tower Insurance Company for summary judgment dismissing the complaint, unanimously affirmed, with costs.

Plaintiff's proof of loss statement included duplicative items, items in which it demonstrably had no

insurable interest and a representation of loss attributable to the expense of debris removal, and expense it later admitted it never incurred. Even if these items were credited, plaintiff's demonstrated losses amounted to only $275,000. The nearly $400,000 remainder of plaintiff's claimed loss in its proof of loss statement remains unaccounted for and unexplained. Overvaluation of insured property raises a presumption of fraud in proportion as to the excess, and such presumption becomes conclusive where, as here, the insurer demonstrates that the difference between the amounts claimed in the proof of loss and the losses actually shown to have been sustained are grossly disparate and without reasonable explanation (see Saks & Co. v Continental Ins. Co., NY 2D 161, 165 [1968]).

Plaintiff's attempt to attribute the gross disparity here at issue solely to its public adjuster is unavailing under agency principles. The adjuster was acting within the scope of this authority when he submitted the claims. Moreover, Plaintiff signed the sworn proof of loss, and was the primary beneficiary of the representations contained therein (see Evans V. International Ins. Co., 168 A.D.2d 374, 374-375 [1990]).

Finally, plaintiff's refusal to provide requested information material and relevant to defendant's investigation of the claimed loss breached the cooperation clause of the policy, and, on that basis alone, coverage may be disclaimed (see Evans v. International Ins. Co., 168 AD2d 374, 374-375 [1990]).

We have considered plaintiff's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER OF THESUPREME COURT, APPELLATE DIVISION FIRST DEPARTMENT

ENTERED: MARCH 15, 2007

CLERK

APPENDIX B

DECISION AND ORDER OF THE TRIAL LEVEL COURT, SUPREME COURT OF THE STATE OF NEW YORK, BRONX COUNTY ENTERED JANUARY 19, 2006.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

_____X

LATHA RESTAURANT CORP.,
d/b/a MARATHON DINER,

Plaintiff,

DECISION AND ORDER

against- Index No.: 24858/95

TOWER INSURANCE COMPANY,

Defendant.

_____X

Defendant Tower Insurance Company of New York ("Tower") moves seeking an order granting it summary judgment pursuant to CPLR §3212. For the reasons that follow hereinafter, Tower's motion is hereby granted.

In this action, plaintiff Latha Restaurant Corp. ("Latha") seeks recovery for the destruction of its diner under an insurance policy issued by Tower. In 1991, Marathon Sky Diner, Inc., purchased a diner located at

543 Hunts Point Avenue, Bronx, New York, for approximately $50,000. It spent an additional $80,000-$90,000 on renovation and purchase of additional equipment and material, included in this amount was $30,000 for labor.

In October 1992, Latha purchased the diner from Marathon for $200,000. According to Notification of sale, Transfer or Assignment in Bulk Notice filed with the New York State Department of Taxation and Finance, this price included $5,000 for "tangible property (furniture, fixtures, etc.)" and $150,000 for "intangible property (goodwill, etc.)". The bulk notice does not specify which items accounted for the remaining $45,000 of the purchase price. After purchase, Latha alleges to have paid $60,000 in cash to a man identified as "Jimmy" to replace some of the equipment purchased with the diner and to make some renovations.

Latha inured the "business personal property" of the diner for $300,000 under a policy issued by Tower. The policy defines business personal property to include furniture, machinery and equipment, stock, and use interest as tenant in improvements and betterments

("I&B"). In addition, the policy provides for debris removal expenses subject to certain conditions and limitations, and $25,000 for business income lost. The policy does not cover "building" property, which it defines as the building or structure itself, as well as permanently installed fixtures, machinery, and equipment. The policy's property-coverage conditions provide that coverage is void if the insured at any time, intentionally conceals or misrepresents a material fact concerning the insured's interest in the covered property or a claim under this coverage part. It further imposes a duty on the insured to cooperate with insurer's investigation in the claim adjustment process.

A year purchase, the diner was completely destroyed by a fire. On March 18, 1994, Latha submitted as sworn Proof of Loss to Tower, in which it alleges to have sustained damages in total amount of $663,627.75, including $65,000 for debris removal expenses, $318,647.75 for contents inside the diner, and $279,980 for a loss of I&B.

Tower has refused to pay under its policy, plaintiff commenced the instant action and Tower now moves for summary judgment pursuant to CPLR§ 3212. It argues

that Latha grossly inflated its proof of loss to a point where it is fraudulent as a matter of law, thereby allowing Tower to disclaim, pursuant to case law and a clause within the policy which renders the policy void if plaintiff "at any time, intentionally conceals[s] or misrepresent[s] a material fact concerning...[the insured's interest] in the Covered Party...[o]r a claim under this Coverage Part." Specifically, Tower alleges that Latha claimed entitlement to improvements and betterments in which it had not insurable interest; double-counted numerous items as both contents and improvements on its proof of loss, thereby grossly inflating its claim by $108,000; claimed entitlement to $65,000 in debris-removal expenses it never performed; claimed to have performed $60,000 worth of improvements on the premise before the fire but cannot or will not provide any documentation or information to back up this claim and refused to answer questions or provide requested documentation relating to the alleged source of these funds. It moves for summary judgment on the additional ground that Latha's refusal to provide Tower with material information during the adjustment

process mandates a finding that it breached its duty to cooperate under the policy.

Clauses within an insurance policy, calling for vitiation of a contract, when the insured files fraudulent claims are implicated when the insured tenders fraudulent proof of loss as a basis for recovery under the policy. Saks & Co. v. Cont'l Ins. Co., 23 N.Y. 2d (1968). That the insured suffered actual loss is irrelevant. Id. Such is also the case when the insured attempts to recover for property it did not own. Carlin v. Crum & Foster Ins., Co., 191 A.D.2d. 373 (1st Dept.1993).

When an insured can only prove a small percentage of his loss a presumption arises that the statement of value and quantity set out in his proof is false and fraudulently prepared. Saks & Co. v. Cont'l Ins. Co.,23 N.Y.2d 161, 166 (1968). "This presumption, however, becomes conclusive where it is shown that the difference between the amounts claimed in the proof of loss and those actually proved to have been destroyed tendered are grossly disparate and explanation tendered is so unreasonable or fantastic that is inescapable that fraud has occurred." Id.

The purpose of the cooperation clause in insurance contracts is to permit the insurer to investigate the legitimacy of a claim. Asline v. Genesee Patrons Co-op Ins. Co., 224 A.D.2d 847 (3d Dept.1996). A technical failure or immaterial omission will not furnish the insurer with a valid basis for voiding its obligation. High Fashions Hair Cutters v. Commercial Union Co., 145 A.D. 2d 465 (2d.Dept.1988). A duty of insured under the cooperation clause of a fire insurance policy is satisfied by substantial performance. Avarello v. State Farm Fire and Cas. Co., 208 A.D.2d 483 (2d Dept.1994).

In order to prevail on non-cooperation grounds, the defendant insurance company must show that the plaintiff-insured had engaged in an unreasonable and willful pattern of refusing to answer material and relevant questions or to supply material and relevant documents. Avarello, 208 A.D.2d 483 (2d Dept. 1994).

Here, the evidence shows a gross, unexplained disparity between the amount of damages claimed to have been caused by the fire and the amount of provable damages. Consequently, summary judgment must be granted to Tower. First, plaintiff has made a claim with regard to property it did not own nor had any interest in,

such as plumbing lines, electrical wiring, panels and outlets. Second, plaintiff has made claims regarding money spent to remove debris, which when testimony was taken from plaintiff's representative, could not be substantiated. Said witness in fact denied incurring such an expense, totaling $65,000. Lastly, plaintiff provides no explanation why some items appear twice on the proof of loss as both contents and I& B, a practice which has inflated plaintiff's claim by $108,000. Plaintiff's only defense to all of the above is that above misrepresentation are attributable to the public adjuster who prepared the claim. Such a defense, however, fails to diminish the implication of fraud, particularly, when any claim form submitted was reviewed and signed by the plaintiff. Moreover, such a claim will not absolve the plaintiff from this obligation not to make fraudulent claims under the contract, because

> [A] principal who has expressly or impliedly appointed another person to make proof of loss under an insurance policy is barred from recovery, under a policy which provides that is shall be void for fraud or false swearing of the insured after the loss, where the agent is guilty of fraud or false swearing in or in connection with the proof of loss; and this is so even though the

> insured is ignorant of the misrepresentation and innocent of any intent to deceive or defraud, and [even when] the act of the agent is to the detriment rather than the benefit of the insured. ***Chubb & Son Inc. v. Consoli***, 283 A.D. 2d 297, 298 (1st Dept. 2001)

The evidence also demonstrates that by refusing to answer questions and provide documentary information pertinent to the alleged $60,000 in expenditures in improvements, plaintiff failed to cooperate with Tower's investigation, thereby allowing Tower to disclaim non-cooperation grounds as well. That plaintiff failed to provide the additional information regarding the $60,000 as it related to Blue Eagle Diner, at the direction of counsel is not dispositive in as much as not answering questions that are material and relevant to the investigation, even on the advice of counsel, may be a violation of the cooperation clause of the contract. Sunbright Fashions, Inc. v. Greater New York Mut. Ins. Co., 34 A.D.2d 235 (1st Dept. 1970). Here, Blue Eagle Diner's finances, to the extent that the alleged $60,000 came from the same, were clearly material and relevant to the investigation.

Summary judgment is a harsh sanction but a court will not hesitate to grant it where there is a material breach of the policy. Evans v. International Ins. Co., 168 A.D.2d 374 (1st Dept. 1990). But given the above, Tower is entitled to the relief sought.

ORDERED that the complaint against Tower be hereby dismissed with prejudice. It is further

ORDERED that Tower serve a copy of this Order with Notice of Entry upon Plaintiff within thirty (30) days hereof.

Dated: January 10, 2005
Bronx, New York

Nelson S. Roman, J.S.C.

APPENDIX C

DECISION AND ORDER OF THE HIGHEST COURT OF NEW YORK, NEW YORK COURT OF APPEALS, DATED JUNE 28, 2007, DENYING DISCRETIONARY REVIEW.

State of New York, Court of Appeals, at a session of the court, held at Court of Appeals Hall in the City of Albany, on the 28th day of June 2007

Present, HON. JUDITH S.KAYE, Chief Judge, presiding

Latha Restaurant Corp., & c.,

Appellant,

Tower Insurance Company,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon has, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

/s/

Stuart M. Cohen
Clerk of the Court.